IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No. 233 of 2005
With
CIVIL APPLICATION No. 10839 of 2005
In
SECOND APPEAL No. 233 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE R.S.GARG

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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ABBASMIYA ZINAMIYA - Appellant(s)
Versus
AAZMMIYA MAHAMADMIYA & 5 - Defendant(s)

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Appearance :
MS VARSHA BRAHMBHATT for Appellant
MR ZUBIN F BHARDA for Respondents

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CORAM : HONOURABLE MR.JUSTICE R.S.GARG

Date : 31/01/2007

COMMON ORAL JUDGMENT

1.Ms. Varsha Brahmbhatt, learned counsel for the

appellant, Shri Z.F. Bharda, learned counsel for the respondents.

2. On 22.11.2006, this Court had issued notice to other side to show cause that why appeal be not admitted for hearing the parties on the proposed question and be not finally disposed of at the first hearing. The respondents are represented through Shri Bharda. The appeal is admitted for hearing the parties on the following substantial question of law.

"Whether on the facts and in the circumstances of the case, the learned first appellate court was justified in granting injunction in favour of the defendants against the plaintiff, restraining the plaintiff from interfering with the possession of the suit property except 553.05 sq.mtrs. even when the defendants did not file any counter claim nor had filed a separate suit seeking the said relief?"

3. The short facts necessary for disposal of the present appeal are that the present appellant

had filed the suit for permanent injunction without seeking any relief for declaration. It was submitted by the appellant that the present respondents-defendants had made certain encroachment upon the land and therefore, they were required to be restrained. The trial court issued notice to the other side and after securing attendance of the present respondents, proceeded with the matter. The defendants, in their turn, submitted that they had not made any encroachment upon the land of the plaintiff, rather the plaintiff had made certain encroachment. They further prayed for dismissal of the suit.

4. It is to be seen that no counter claim was made by the present respondents/defendants nor they had made any prayer to the Court for grant of any relief in their favour. Learned trial court, after hearing the parties decreed the suit, but on appeal, the appellate court not only set aside the order passed by the trial court, but it directed that the suit stands dismissed and the respondent [original plaintiff] is hereby

restrained not to obstruct [interfere] in possession of the suit property except 553.05 sq.mts. as shown in the super test report on which the respondent [plaintiff] had made encroachment. The plaintiff being aggrieved by the order passed by the appellate court is now before this Court.

5. Learned counsel for the appellant submits that in the suit filed by the plaintiff, no relief or decree can be granted in favour of the defendants unless the defendants propose to file a counter claim in accordance with Rule-6 of Order VIII of the Code of Civil Procedure and the Court grants appropriate opportunity to the plaintiff to file his written statement to the counter claim made by the defendants. Her further submission is that unless an issue is cast on the counter claim, evidence beyond the dispute in the suit cannot be looked into and no relief can be granted in favour of the defendants who have not chosen to file a counter claim. It is submitted by counsel that the directions restraining the plaintiff are

uncalled for and deserve to be set aside.

6. Shri Bharda, learned counsel for the respondents/defendants submits that present is a case where some relief in equity had been allowed in favour of the defendants and as the revenue courts have already held that the plaintiff has made some encroachment upon the land belonging to the defendants, the appellate court was absolutely justified in restraining the plaintiff from interfering with the defendants' possession.

7. It is not disputed before me and the parties also concede that on some application, Revenue Officer directed that measurement be taken to ascertain that who is in possession of which property. It is said that the appeal filed by the defendants was allowed by the Deputy Collector, who, in his turn, directed that measurements be taken, the said order was challenged by the plaintiffs before the Collector and on dismissal of those proceedings, the matter is pending consideration before the Special Secretary [Appeals]. It is also not

disputed by the parties that no revenue court of competent jurisdiction has passed any order for eviction of the plaintiff from the land which the defendants allege to be their own.

8. History of the revenue matters is recorded simply to record a finding that undisputedly the plaintiff is in possession of the property. If the plaintiff is in possession of the property and the defendant wants possession of the same, then he has to take appropriate proceedings either by filing a civil suit or by filing a counter claim in the suit filed by the plaintiff or by filing appropriate application before the revenue court of competent jurisdiction for removal of the illegal encroachment. So long as such application or counter claim or suit are not filed, no court would be entitled to issue an injunction against the present plaintiff restraining him from interfering with possession of the defendants, specially when the defendants undisputedly are not in possession of the property in dispute. It is also trite to say that in absence of a

counter claim, a decree cannot be granted in favour of the defendants, because, a court would assume jurisdiction to grant decree either on filing of a suit or on submission of a counter claim.

9. Taking into consideration the totality of the circumstances and the admitted position, I answer the question in favour of the appellant-plaintiff and hereby direct that the observations made by the learned appellate Judge that; “Respondents is hereby restrained not to obstruct in possession of suit property except 553.05 sq.mtrs. as shown in super test on which respondent has made encroachment over the suit land of appellants” are hereby set aside, deleted and quashed.

10. The appeal is allowed to the extent indicated above. The suit of the plaintiff stands dismissed, because, the said dismissal has not been challenged before this Court, but at the same time, I set aside the decree which has been granted by the lower appellate court in favour of the defendants.

11. I make it clear that if the law permits the defendants to approach either the Civil Court or revenue court of competent jurisdiction for appropriate reliefs, then the defendants would be entitled to approach the said Forum.

12. The appeal is allowed to the extent indicated above. In view of the final disposal of the appeal, Civil Application stands disposed of. No cost.

13. Let a decree be framed accordingly.

[R.S. GARG, J.]

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